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No. 108

# In the Supreme Court of the United States

OCTOBER TERM, 1956

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

P. G. LAKE, INC.

FRANK SCOFIELD, FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

*v.*

DENNIS M. O'CONNOR AND KATHERINE O'CONNOR, INDEPENDENT EXECUTORS OF THE ESTATE OF THOMAS O'CONNOR, DECEASED, AND DENNIS M. O'CONNOR, KATHERINE O'CONNOR, MARY O'CONNOR BRAMAN, JOINED BY HER HUSBAND, D. H. BRAMAN, AND THOMAS O'CONNOR, JR.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

WM. FLEMING AND BESSIE M. FLEMING (HUSBAND AND WIFE), F. HOWARD WALSH AND MARY D. WALSH (HUSBAND AND WIFE), AND MARY D. FLEMING WALSH

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

JOHN WRATHER AND NELL WRATHER, HUSBAND AND WIFE

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

W. F. WEED, INDIVIDUAL, AND ESTATE OF ELEANOR M. WEED, DECEASED, W. F. WEED, EXECUTOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY TO BRIEFS IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 921

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

P. G. LAKE, INC.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY TO BRIEFS IN OPPOSITION

1. While taxpayers (*O'Connor* Br. 9–11; *Lake* Br. 23–26; *Wrather* Br. 7–8)[1] assert that the decisions below are not in conflict with the Seventh Circuit's decision in *Commissioner* v. *Slagter*, 238 F. 2d 901, they offer no adequate explanation. They argue that *Slagter* held that there was "not a sale at all." This argument, however, ignores the Seventh Circuit's express admonition that it was not concerned "with State decisions as to property rights" (p. 903). In *Slagter*,

*Together with *Scofield* v. *O'Connor, et al.*; *Commissioner* v. *Fleming, et al.*; *Commissioner* v. *Wrather, et al.*; *Commissioner* v. *Wood, et al.*

[1] *Wood* opposes the granting of the writ but has waived the right to file a brief in opposition. The *Fleming* brief in opposition is devoted to an argument relating to the preliminary question there involved.



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as in these cases, "The decisive question is whether the transaction, when viewed in the light of federal legislation, amounted to a sale of capital assets or merely to an assignment of anticipatory income" (p. 903). It is this issue—whether the transactions are within not only the letter but also the intent of Section 117 of the 1939 Code (see *Burnet* v. *Harmel*, 287 U. S. 103; *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51-52)—upon which the court below and the Seventh Circuit reached directly conflicting decisions.

The *O'Connor* brief erroneously implies (pp. 9-10) that the Government's arguments in the oil payment cases have been uniformly rejected by the judges who have passed upon them. Apparently overlooked are the three Seventh Circuit judges who decided *Slaughter*, the six Tax Court judges who dissented in *Hawn*, the three Fifth Circuit judges who decided *Hawn* and the dissenting judge in *Caldwell*. In fact, the decisions below and the decision in *Hawn*, together with the dissent in *Caldwell*, suggest a possible divergence of view within the Fifth Circuit itself.[1]

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[1] The other arguments of the taxpayers stem from a statement in the *Stoddard* opinion as to when income is taxed under the assignment of income rule, a point which the court below did not reach because of its holding that the oil payment assignments constituted sales of property, rather than assignments of income. And see Pet. 13.

With the possibility of disagreement among the judges of the Fifth Circuit in mind and because of the importance of the question presented, the Government filed with the court below a printed suggestion that the instant five cases be argued *seriatim* before the court *en banc*. Opposing counsel in all five cases advised the court that they concurred in that suggestion. However, the cases were set down for oral argument *seriatim* but not before the court *en banc*.

2. Taxpayers attempt to belittle the importance of the question presented by resorting to various arguments, only two of which require comment. The *Wrather* brief (p. 9) asserts that review by this Court is not necessary because the lower courts will not "permit mere form to prevail over substance." But that is exactly, we contend, what the court below did in all five of these cases. The *O'Connor* brief (pp. 12–15), on the assumption that the Government's only argument is that *all* oil payment assignments for a consideration constitute assignments of income, argues that such an "extreme position" (Br. 13) is untenable and that the decisions below furnish criteria for determining whether any given oil payment assignment constitutes an assignment of income as distinguished from the sale of a capital asset. But, as we understand the criteria discussed by the court below, only the most exceptional oil payment assignments for a consideration will be unable to qualify as sales of capital assets. No explanation is given as to how the holdings below can be reconciled with the principles applied in *Slagter*. Moreover, the Government's so-called "extreme position" is not the only possible basis for decision by this Court in enunciating the standards applicable to the taxation of oil payment assignments.[4]

3. In *Fleming*, which differs from the other cases only in that the oil payment assignments were made in return for real estate rather than for cash, the taxpayers contend that their case need not be considered

[4] That position was not argued by the Government on appeal in either the present cases or *Slagter*, but *Slagter* was nevertheless reversed on the basis of the assignment of income rule.

along with the others because it involves a separate preliminary question. However, this question, relating to the holding below that the Flemings' oil payment transactions are not taxable at all under Section 112 (b) (1) (Pet. 22-23), is so intimately related to the ultimate issue in all of the cases that its consideration by the Court is believed to be highly warranted.

If the *Fleming* decision on the preliminary question is allowed to stand, the owners of oil interests can avoid ordinary income tax on oil income by the simple expedient of assigning oil payments for real estate and then selling the real estate at any time after six months, the proceeds being taxed at the favorable capital gain rates. In that respect, the decision below offers a means of circumventing a decision in favor of the Government on the main issue in the cases.

Moreover, the Flemings are in error in asserting (Br. 8) that there is no conflict on this preliminary question. Section 112 (b) (1), so far as pertinent here, provides for the nonrecognition of gain only if "property held for productive use in trade or business * * * is exchanged solely for property of a like kind * * *." Thus, it is required that "property" be "exchanged" by the taxpayer. Under the *Slaytor* decision of the Seventh Circuit, the Flemings' oil payment assignments were assignments of future income, rather than exchanges of property. Although *Slaytor* involved Section 117, rather than Section 112 (b) (1), it is unrealistic to suppose that oil payment rights are "property" under a Code provision providing for tax-free transactions if they are not "property" under a Code provision which only accords preferential

tax treatment. The *Fleming* decision is basically in conflict with *Slaughter*.

The respondents' briefs in opposition have, we believe, failed to answer the Government's contentions (Pet. 9–21) that the questions presented are of substantial importance and that the courts of appeals have reached conflicting decisions on these questions. Accordingly, it is respectfully submitted that the petition for certiorari should be granted.

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